Re Ng Liang Shing; ex parte Sirim Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D-29–2777 OF 2010
MOHAMAD ARIFF J
19 JANUARY 2012

Bankruptcy — Bankruptcy notice — Setting aside — Appeal — Service of bankruptcy notice — Whether served personally on judgement debtor ('JD') — Whether acknowledged and signed by person who was not JD — Whether service was effected fraudulently — Whether statutory requirements of Bankruptcy Act 1967 and Bankruptcy Rules strictly complied — Bankruptcy Act 1967 s 131 — Bankruptcy Rules 1969 rr 97, 100(1) & 111(1)

Evidence — Admissibility — Electronic or computer evidence — Authenticity and admissibility — Relevance and weight to be given to e-mail trail and electronic attendance record — Whether required to be tested against normal rules on evidence on burden and standard of proof

Evidence — Forgery — Allegation of — Signature — Police report lodged — Whether sufficient — Whether verification of forgery by Chemistry Department required

The applicant, the judgment debtor ('JD'), appealed against the decision of the senior assistant registrar ('SAR') who had dismissed its application to set aside the bankruptcy notice. In support of the application, JD raised the following grounds: (a) the bankruptcy notice against the JD had not been personally served on them; (b) the bankruptcy notice as allegedly served, was acknowledged and signed by a person who was not the JD; and (c) the service of the bankruptcy notice was effected fraudulently. To support the above grounds, the JD deposed in the affidavit, that the signature found as acknowledging the covering letter enclosing the bankruptcy notice, was not their signature. The JD had subsequently lodged a police report on this alleged forgery of his signature. Further, the JD also alleged that at the material time the bankruptcy notice was said to have been personally served on him at his house, he was in fact in his department in the University of Malaya working. There were two main issues as follows: (a) whether the JD's version of the facts was a plausible after evaluating the totality of their affidavit evidence; (b) whether the judgment creditor ('JC') had complied strictly with the statutory requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules.

Held, dismissing the appeal with costs of RM1,000 to be paid by the JD to the JC:

(1) The evidence provided by the JD on the alleged non-service of the bankruptcy notice was doubtful. It was all too easy for a JD to acknowledge service of a bankruptcy notice by a different signature and then subsequently maintain the signature was not his. The clocking in record was also inconclusive since it does not prove at what time he left his department. Even the e mail only established, at its best, the fact that at 2.45pm he was in his department. Evidence on his alleged presence at 2pm in his department remains very much in doubt (see para 8).

(2) Although the JD had lodged a police report on the alleged forgery of signature, one would expect that more should have been done by him, such as arranging for the verification of the forgery by the Chemistry Department. On the other hand, the evidence suggests that he was the one who approached the JC to discuss possibilities of settlement of the judgment sum, which, on the evidence, was entered by consent. The behaviour of the JD could not be seen as the behaviour of someone who had been defrauded (see para 9).

(3) Although the JC had not objected to the authenticity and admissibility of the JD's electronic evidence, nevertheless, for such evidence to be admitted, it would also require the evidence to be tested against the normal rules of evidence on burden and standard of proof and the weight to be attached to the evidence. The court found the relevance and weight to be given to the e mail trail and the electronic attendance record to fall far short of proof that the JD was actually in his department when the bankruptcy notice was purportedly served on him (see para 10).

[Bahasa Malaysia summary

Pemohon, penghutang penghakiman ('JD'), telah merayu terhadap keputusan penolong kanan pendaftar ('PKP') yang telah menolak permohonannya untuk mengetepikan notis kebankrapan. Bagi menyokong permohonan itu, JD telah membangkitkan alasan-alasan berikut: (a) notis kebankrapan terhadap JD tidak disampaikan secara kediri ke atas mereka; (b) notis kebankrapan sebagaimana dikatakan telah diserahkan, telah diakui penerimaannya dan ditandatangani oleh seseorang yang bukan JD; dan (c) penyampaian notis kebankrapan itu telah dilaksanakan secara fraud. Bagi menyokong alasan-alasan di atas, JD telah mendeposkan dalam afidavit, bahawa tandatangan yang didapati sebagai mengesahkan surat iringan yang melampirkan notis kebankrapan itu, bukanlah tandatangan mereka. JD kemudian telah membuat laporan polis berhubung pemalsuan yang dikatakan mengenai tandatangannya. Selanjutnya, JD juga mengatakan bahawa pada masa matan notis kebankrapan itu dikatakan telah diserahkan secara kediri ke atasnya di rumahnya, dia sebenarnya bekerja di jabatannya di Univesiti

Malaya. Terdapat dua isu utama seperti berikut: (a) sama ada versi JD berhubung fakta berkemungkinan wujud selepas menilai keseluruhan keterangan afidavit mereka; (b) sama ada pemiutang penghakiman ('JC') telah mematuhi dengan betul keperluan-keperluan statutori Akta Kebankrapan dan Kaedah-Kaedah Kebankapan.

Diputuskan, menolak rayuan dengan kos RM1,000 dibayar oleh JD kepada JC:

(1) Keterangan yang diberikan oleh JD berhubung notis kebankrapan yang dikatakan tidak disampaikan adalah diragui. Ianya mudah untuk JD mengesahkan penyampaian notis kebankrapan dengan menurunkan tandatangan yang berbeza dan kemudian berhujah yang tandatangan itu bukan miliknya. Perakam masa dalam rekod juga tidak konklusif kerana ia tidak membuktikan pukul berapa dia meninggalkan jabatannya. Bahkan emel juga hanya membuktikan, paling tidak, fakta bahawa pada pukul 2.45 petang dia berada di jabatannya. Keterangan berhubung kewujudannya yang dikatakan pada pukul 2.00 petang di jabatannya masih amat diragui (lihat perenggan 8).

(2) Walaupun JD telah membuat laporan polis berhubung pemalsuan tandatangan yang dikatakan itu, seseorang itu akan menjangkakan lebih patut dilakukan olehnya, seperti menguruskan untuk pengesahan pemalsuan itu oleh Jabatan Kimia. Sebaliknya, keterangan mencadangkan bahawa dialah yang berjumpa JC untuk membincangkan kemungkinan penyelesaian jumlah penghakiman, yang mana, atas keterangan, telah dimasukkan dengan persetujuan. Kelakuan JD tidak menunjukkan kelakuan seseorang yang telah ditipu (lihat perenggan 9).

(3) Walaupun JC tidak membantah berhubung pengesahan dan kebolehterimaan keterangan elektronik JD, untuk keterangan sedemikian diterima, ia juga memerlukan keterangan itu diuji dengan rukun-rukun keterangan biasa berhubung beban dan piawai bukti dan beban yang terletak pada keterangan itu. Mahkamah mendapati rantaian emel dan rekod kehadiran elektronik tidak mempunyai kerelevanan dan beban untuk membuktikan bahawa JD sebenarnya berada di dalam jabatannya semasa notis kebankrapan diserahkan ke atasnya (lihat perenggan 10).]

Cases referred to

Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606; [2010] 1 LNS 974, HC (folld)

Legislation referred to

Bankruptcy Act 1967 s 131
Bankruptcy Rules 1969 rr 97, 100(1), 111(1)

A

Mohamed Ibrahim Mohamad (Yusma Azlin & Co) for the judgment debtor.
Juriah Robason (Ram Reza & Muhammad) for the judgment creditor.

Mohamad Ariff J:

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[1] This is an appeal against the decision of the senior assistant registrar who had dismissed the judgment debtor's application to set aside the bankruptcy notice which was issued on 15 July 2010. Three grounds have been raised by
C the judgment debtor in support of the application, and presently in support of the appeal, and these are as follows:

(a) the bankruptcy notice against the judgment debtor has not been personally served on the judgment debtor;

D (b) the bankruptcy notice as allegedly served, was acknowledged and signed by a person who is not the judgment debtor; and

(c) the service of the bankruptcy notice was effected fraudulently.

E **[2]** To support these grounds, the judgment debtor states in his supporting affidavit affirmed on 6 June 2011 (para 7 thereof) that the signature found as acknowledging the covering letter enclosing the bankruptcy notice, is not the judgment debtor's signature. To persuade this court, the judgment debtor provides in exh 'NLS4' his real signature. The disputed signature is found in
F exhi 'NLS3' which is appended to the supporting affidavit. The judgment debtor also deposes in his affidavit that he had subsequently lodged a police report on this alleged forgery of his signature. The police report appears as 'exh NLS5'.

G **[3]** In the circumstances, the bankruptcy notice is said not to have been personally served on him and therefore suffers from a fatal defect which vitiates the entire bankruptcy proceedings.

[4] The judgment debtor also provides some evidence to show that at the
H material time the bankruptcy notice was said to have been personally served on him at his house, he was in fact in his department in the University of Malaya working. The judgment debtor provides in exh 'NLS6' an excerpt from his department's electronic attendance record which shows that on that day ie 18 August 2010 he had clocked in at 11.39am. According to the endorsement
I by the process server, Mohamed Firdaus bin Abdul Wahid, service of the bankruptcy notice was effected at 2pm. See exh 'MF2' to the affidavit of service affirmed on 2 September 2010.

[5] The judgement debtor also provides details of his 'sent' e mails on the day

in exh 'NILS7' which shows a sent message time-stamped at 12.01pm and a second 'sent' message time-stamped 2.45pm.

[6] It is pertinent to note that the judgment debtor does not dispute the service of the creditor's petition on him which was effected subsequently on 29 April 2011 at his home.

[7] On the facts and circumstances of this application, there are two main issues. One concerns whether the judgment debtor's version of the facts is a plausible one after evaluating the totality of the affidavit evidence. The second relates to whether the judgment creditor has complied strictly with the statutory requirements of the Bankruptcy Act and the Bankruptcy Rules. In this regard it is necessary to emphasise that we have an affidavit of service affirmed by the process server that the bankruptcy notice was served. The relevant rules, rr 97 and 111(1) specify that the bankruptcy notice shall be served and service shall be proved 'in the like manner … prescribed for the service of a creditor's petition' and further that service 'shall be proved by affidavit'. Under r 100(1) of the Bankruptcy Rules, the judgment debtor shall state his name, his identity card number and his address at the time of service. On the evidence, I find these requirements have been fulfilled in substance. The covering letter dated 12 August 2010, which contains the acknowledgement of receipt of the bankruptcy notice, includes all the necessary particulars. Should there be any formal defect or irregularity under r 100(1), these can be cured under s 131 of the Bankruptcy Act 1967 if the court is of the opinion that no substantial injustice has been caused by the defect or irregularity.

[8] On the other hand, the evidence provided by the judgment debtor on the alleged non-service of the bankruptcy notice is suspect. It is all too easy for a judgment debtor to acknowledge service of a bankruptcy notice by a different signature and then subsequently maintain the signature is not his. The clocking in record is also inconclusive since it does not prove at what time he left his department. Even the e mail only establishes, at its best, the fact that at 2.45pm he was in his department. Evidence on his alleged presence at 2pm in his department remains very much in doubt. I have borne in mind the judgment debtor's allegation of forgery and fraud. Needless to unduly emphasise, the burden and standard of proof in civil proceedings in relation to fraud is a heavy one, and in this regard I am in full agreement with the lucid statement of the law by Vernon Ong J in *Mohd Nasir bin Moidu v Lee Swee Kim* [2011] 7 MLJ 606; [2010] 1 LNS 974, which I take the liberty to reproduce below:

> In this case the onus is upon the plaintiff to establish the alleged fraud. The standard of proof is that of proof beyond reasonable doubt (*Boonsoom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17 (CA); *Narayanan Chettyar v Official Assignee,* Rangoon AIR 1941 PC 93, 95 applied in the Singapore High

A Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] 1 MLJ 173; [1959] 1 LNS 63; *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81; [1983] CLJ 387 (Rep); [1983] 1 CLJ 183; [1983] 1 MLJ 81 (FC); *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174; *Chye Chew & Anor v Eastern Mining & Metals Co Ltd* [1965] 1 MLJ 201; [1964] 1 LNS 194 (FC) … Proof beyond reasonable doubt does not, however, mean proof B beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt …

C

[9] Although the judgment debtor has lodged a police report on the alleged forgery of signature, one would expect that more should have been done by him, such as arranging for the verification of the forgery by the chemistry D department. On the other hand, the evidence suggests he was the one who approached the judgment creditor to discuss possibilities of settlement of the judgment sum, which, on the evidence, was entered by consent. The behaviour of the judgment debtor cannot be seen as the behaviour of someone who has been defrauded.

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[10] It needs to be observed that the main evidence advanced by the judgment debtor is electronic evidence. Counsel for the judgment creditor has not objected to their authenticity and admissibility, and as such the judgment creditor can be assumed to have been satisfied on the integrity of the computer F system in the university and the department concerned. However, electronic or computer evidence, when admitted, also require to be tested against the normal rules on evidence on burden and standard of proof and the weight to be attached to the evidence. With respect, I find the relevance and weight to be given to the e mail trail and the electronic attendance record to fall far short of G proof that the judgment debtor was actually in his department when the bankruptcy notice was purportedly served on him.

[11] In these circumstances, the only proper order for this court to make is to dismiss the appeal with costs of RM1,000 to be paid by the judgment debtor to H the judgment creditor.

Appeal dismissed with costs of RM1,000 to be paid by judgment debtor to judgment creditor.

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Reported by Ashgar Ali Ali Mohamed